



WISCONSIN LEGISLATIVE COUNCIL

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CLEARINGHOUSE RULE 02-046

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

Newly created s. NR 2.12 (3) excludes persons not identified as parties at noticed prehearing conferences from examining or cross-examining witnesses at “the hearing.” This new subsection appears to govern who has the right to examine and cross-examine at all hearings. If so, it appears to conflict with s. 227.45 (6), Stats., which gives parties in contested cases the right to conduct cross-examinations “reasonably required for a full and true disclosure of the facts.”

2. Form, Style and Placement in Administrative Code

a. In s. NR 2.01, “This chapter” should replace “These rules.” The extent of the applicability of definitions in s. NR 2.02 should be clearly stated, e.g., by a phrase such as “In this chapter:” preceding the definitions. [See s. 1.01 (7), Manual.]

b. Will a noncontested case hearing ever be held before an administrative law judge? If so, the definition in s. NR 2.02 (7) should be changed to reflect this.

c. There are instances of words that are run together. For example, see “notto” in s. NR 2.05 (5). Also, see s. NR 2.157 (1) (intro.).

d. In general, newly created s. NR 2.12 (3) and (4) do not seem to belong within s. NR 2.12, which is titled “Informal conferences and prehearing conferences.” These subsections are

more relevant to whether examination and cross-examination are permitted at, and when and how motions should be served prior to, hearings that take place *subsequent* to informal and prehearing conferences. If retained in s. NR 2.12, a new section title should be considered.

e. The form for declaratory rulings under s. NR 2.05 (3) has a couple phrases that are not stricken or underlined, but yet are not a part of the current form. After “In the matter of the applicability of” the current form has the word “rule” where the proposed form has the words “the following statute or rule.” In the following sentence, the current form has the word “rule” where the proposed form has the words “statute or rule.”

f. Section NR 2.10 has some words that are not underlined, but yet are not a part of the current rule. Beginning in the second line, it appears that the following should be underlined: “administrative law judge, on the judge’s own motion or at the request of a party, or any attorney of record for a party in a contested case hearing.” In the fourth line, it appears that the following should be underlined: “contested case.” In the fifth line, it appears that the following should be underlined: “documents.” In the sixth line, it appears that the following should be underlined: “issuing the.”

g. In s. NR 2.12 (1) (e), it appears that the following should be underlined: “identification of witnesses and”.

h. In s. NR 2.135 (2) (a), fourth line, “Any” should be underlined.

i. In the title of s. NR 2.19 (7), “FOLLOWING HEARING” should be underlined.

j. The entire paragraph of s. NR 2.19 (8) is missing appropriate striking and underlining for the words that have been deleted and added. For example, the first sentence replaces “was requested shall be open” in the current rule with “has been requested shall be kept confidential.” The rest of the sentence is also different than the rest of the first sentence in the current rule, and the same holds true for the rest of the paragraph.

k. The rule replaces “employes” with “employees” in s. NR 2.195 (1), (2), (5) (b) and (6) (b), but these subsections in the current rules do not use this spelling for “employees.”

4. Adequacy of References to Related Statutes, Rules and Forms

a. Section NR 2.02 (8) changes the definition of “noncontested *case*” from a “*proceeding* before the department which is not a contested case” to a “*hearing* before the department” Is a hearing always held in a noncontested case? If not, perhaps “proceeding” is a more accurate term. Also, while the word “proceeding” can be used to describe either a case of a hearing, a “hearing” takes place after a case has begun and before a decision, and thus should not replace “proceeding” in the definition of “noncontested case” under s. NR 2.02 (8).

b. In s. NR 2.05 (2) (a), it is suggested that “promulgation” be substituted for “adoption” in two places.

c. In s. NR 2.05 (5), towards the end of that form, after “The injury to the person requesting the hearing is different in kind or degree from injury to the general public caused by,” “the” should be inserted before “agency action or inaction . . . ,” so as to conform the meaning with that of s. 227.42 (1) (c), Stats.

d. Section NR 2.06 (3) adds “publication” to the ways in which the department can require notice of hearing to be served. Section 227.44 (1), Stats., however, states that, for contested cases: “***Except in the case of an emergency***, reasonable notice shall consist of ***mailing*** notice to known interested parties at least 10 days prior to the hearing.” [Emphasis added.] Therefore, it appears that the rule should limit the department’s ability to authorize service by publication to emergencies, with respect to known interested parties in contested cases.

e. The last sentence of s. NR 2.08 (6) states: “The list of parties required by s. NR 2.155 (3), for purposes of review under s. 227.53, Stats., may differ from the list required by this section.” This raises two questions:

- (1) The last sentence of s. 227.47 (1), Stats., states: “The agency shall by rule establish a procedure for determination of parties.” What is the procedure required by s. 227.47 (1), Stats., for determination of who is on the list for purposes of s. NR 2.08 (6)?
- (2) Given that the third sentence of s. 227.47 (1), Stats., requires ***every*** proposed or final decision to include a list of the names and addresses of all persons who appeared before the agency in the proceeding who are considered parties for purposes of review under s. 227.53, Stats. (i.e., “persons affirmatively demonstrating active interest in the proceedings” according to the annotation following s. 227.53, Stats.), why would there be a difference between the lists in ss. NR 2.155 (3) and 2.08 (6)?

f. The rule repeals current s. NR 2.135 (3), which requires a list of persons certified as parties for ***noncontested*** case hearings, although this requirement appears to be statutory. [See the third sentence of s. 227.47 (1), Stats.]

g. Because s. NR 2.20 (2) is amended to require that petitions for review be served on the secretary as provided for in s. NR 2.03, it appears that “petitions for review” should be included among the petitions listed at the beginning of s. NR 2.03. Also, since the title of s. NR 2.03 is “**Service on the department**,” should the language of both ss. NR 2.20 (2) and NR 2.03 refer to service on the ***department*** rather than service on the ***secretary***?

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. The analysis states in the last sentence of the first paragraph: “The date petitions are considered to have been made ***s being proposed to be***” [Emphasis added to show a phrase that contains a typo (“s”) and could be shortened to “is changed to”] More importantly, it would be clearer to replace the words “petitions are” in that sentence to “that service on the

department by mailing is” to reflect that, in s. NR 2.03, it is “service by mailing” which is defined as not occurring until the date the department receives the petition.

b. Should the analysis in the rule mention other substantive provisions in the rule, such as the possibility that lists of parties may differ for the same case under s. NR 2.08 (6), that publication is added to the ways that the department can require notice of hearing to be served under s. NR 2.06 (3), that persons not identified as parties at noticed prehearing conferences can be excluded from examining or cross-examining witnesses at subsequent hearings under s. NR 2.12 (3), and that authority for recommending alternative dispute resolution is created under s. NR 2.115?

c. In the last sentence of s. NR 2.05 (5), suggest deleting “a hearing:” and adding “that a hearing be held as a contested case:”, since the form that follows is not for use in requesting a hearing as part of a noncontested case.

d. In s. NR 2.13 (6), “shall” should be changed to “may.”

e. In s. NR 2.14 (5), third line, “and to provide reasonable time as the administrative law judge may order” sounds awkward. Perhaps insert “whatever” between “provide” and “reasonable.” Also, “therewith” in line five and “thereof” in line six should be deleted. [See s. 1.01 (8) (c), Manual.]

f. In s. NR 2.157 (1) (intro.), last sentence, “whether” should be deleted before the colon, and perhaps inserted into each of the following paragraphs as appropriate.